

a) Class Rights

If a potential amendment would adversely modify any preference or right of one or more classes or series of stock, then holders of such affected class are, unless articles provide otherwise, entitled to **vote as a class** on the amendment. A majority vote of that class is necessary to pass the amendment.

b) Before Stock Issued

Generally at least a majority, or in some states two-thirds, of the incorporators or the board of directors of any corporation may, before issuing any stock, amend the articles of incorporation of the corporation by signing and filing with the secretary of state a certificate amending, modifying, changing or altering the articles, in whole or in part.

★★★ B. Mergers and Consolidation

A potential merger or consolidation of two corporations requires approval of their boards of directors, stockholders, and the provision of appraisal rights to dissenting shareholders of those corporations. A **merger** occurs when one of two existing corporations is absorbed into another corporation. If, however, two existing corporations combine into one new corporation, the result is a **consolidation**. In most states, a merger or consolidation requires the recommendation of an absolute majority of the board of directors and the agreement of each corporation (by an absolute majority of shareholders) to a plan of merger or consolidation. In **Alabama**, however, a merger or consolidation requires the recommendation of a majority of the board of directors and the agreement of **two-thirds** of shareholders entitled to vote of each corporation. Once the articles of merger are approved, they must be filed with a state.

1) DISSENTERS' RIGHTS

A merger or consolidation would trigger the dissenters' rights as the minority. The price paid to the dissenters is "fair value." That is defined as "the value of the shares immediately before the effectuation of the corporate action to which the dissenter objects, excluding any appreciation or depreciation in anticipation of the corporate action unless exclusion would be inequitable." RMBCA § 13.01(3). However, obtaining fair value, a dissenting shareholder will lose the right to challenge the action (absent fraud). Accordingly, she has the option to **either** challenge the action or receive fair value.

2) SHORT-FORM MERGER

Under many state statutes, and in Alabama, if a parent corporation owns at least 80% of the stock of subsidiary, the subsidiary may be merged into the parent absent voting approval by the shareholders of either company (most states require 90% ownership).

3) EXCHANGES OF SECURITIES

The MBCA provides that the board of directors of two corporations may agree to a plan of exchange. All shareholders from both corporations who have voting rights must give majority approval of the plan for it to be effective. That plan results in a first corporation's acquisition of all of a second corporation's outstanding shares of stock. The plan indicates what the second corporation receives in return for those shares, such as property, cash, or other obligations and securities. The plan becomes effective when it is filed with a state, unless the parties abandon it before that filing occurs.

★★★ **C. Sales of Substantially All Corporate Assets**

1) GENERAL--SHAREHOLDER APPROVAL REQUIRED

Under RMBCA § 12.02, shareholder approval is required only for the corporation to "sell, lease, exchange, or otherwise dispose of all, or **substantially all**, of its property ... otherwise than in the usual and regular course of business..." The RMBCA differentiates between sales of all or substantially all of the assets of a corporation made in the usual and regular course of business and such sales that are not made in the usual and regular course of business. Compare RMBCA § 12.01(a)(1) with RMBCA § 12.02(a).

2) ORDINARY COURSE OF BUSINESS EXCEPTION

If a sale of corporate property occurs in the usual and regular course corporate business, it may be accomplished without the approval of the shareholders, unless otherwise required by the articles of incorporation. RMBCA § 12.01(b). If not, the sale of all or substantially all of the assets must be approved by a majority of all the shares voting together.

3) DISSENTERS' RIGHTS

A sale of corporate property in the usual and regular course of corporate business would also trigger the dissenters' rights of the minority shareholders.

D. Recapitalizations

A recapitalization is a change in the corporation's stock structure in order to achieve a particular goal. A typical goal is to change the rights of a class of stock. For example, if a corporation owes back dividends to preferred shares, the shareholders may attempt to alter the preference rights of those shares to eliminate the payment. Essentially, a recapitalization may result in the majority hindering the rights of the minority. A recapitalization can be challenged by those who are adversely affected. They must demonstrate the unfairness and lack of legitimate purpose for the recapitalization.

E. Dissolution of Organization

1) MAJORITY OF BOARD AND SHAREHOLDERS

The voluntary dissolution of a corporation generally must be recommended by an absolute majority of the board of directors and approved by an absolute majority of the shareholders. RMBCA § 14.02(b). Shareholder voting on a proposed dissolution is not by class, unless class voting is required by the articles of incorporation or provided by the board of directors. RMBCA § 14.02(e). In Alabama, a two-thirds vote of all shareholders entitled to vote is required for dissolution, regardless of class. Shareholders are entitled to a “pro-rata” distribution upon dissolution unless a class preference exists.

Some states require a majority vote instead of two-thirds vote of shareholders in order for dissolution to be effective.

2) DISSOLUTION DOES NOT TRIGGER DISSENTERS’ RIGHTS

Dissolution does not trigger dissenters' rights, since the dissolution process contemplates a liquidation of the corporate assets and distributions of their proceeds to the shareholders. RMBCA § 14.05(a).

★★★ 3) INVOLUNTARY DISSOLUTION (CLOSE CORPORATIONS)

a) General

Courts may intervene in the affairs of closely held corporations under limited circumstances. A court may dissolve a corporation in a shareholder-initiated proceeding if it is established that the directors or those in control of the corporation have acted, are acting, or will act in a manner that is illegal, **oppressive**, or fraudulent.

The legal standard for oppressive conduct is not clearly established. Some courts define oppression as violating the reasonable expectations of shareholders. Many courts have taken an alternative approach, finding that in closely held corporations, controlling shareholders have a higher fiduciary duty to minority shareholders than in publicly held corporations. Whether the standard is reasonable expectations of shareholders or the duty of good faith and loyalty from majority to minority shareholders, it is clear that attempts to freeze out minority shareholders are oppressive if the majority shareholders profit from the corporation to the detriment of minority shareholders.

★★★ b) Buyout Option

The RMBCA provides that if a proceeding is started to dissolve a corporation, the corporation may terminate the action if it, or a shareholder, purchases the complaining shareholders' shares for fair value. RMBCA § 14.34(a).

VIII. CLOSE CORPORATIONS AND SPECIAL CONTROL DEVICES

★★★A. Share Transfer Restrictions